before the High Court without Assessors under the Criminal Procedure Code will make it clear that the law makers in setting out the modified procedure for security trials were well aware of the existing criminal procedure and has every intention of effecting a substantial change thereto.

Beginning with section 178 of the Criminal Procedure Code, I note that regulation 11 of the regulations, which bears the same marginal title i.e. "Commencement of trial" is identical. Section 179 and regulation 12, which again bear identical marginal titles, make no alteration in procedure.

Only when we come to section 180, and compare it with the parallel regulation 13 do we find a significant difference. Section 180 reads:

"When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence."

Compare these words to those of regulation 13 which reads:

"When the case for the prosecution is closed, the court shall call on the accused to enter on his defence."

Why, one may ask were the material words "if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an acquittal or if it does not so find" omitted?

Azmi J. in *Public Prosecutor* v. *Yap Seng Keat*[3] has noted one major reason, a reason if I may say with deepest respect, of great significance, for his Lordship said:

"The main encroachment into the ordinary practice of criminal law made by these Regulations is that, it is not necessary for the prosecution to prove their case beyond reasonable doubt at the close of their case, and it seems to me that the principle that the defence should not be called merely to clear any doubt in the prosecution case or to supplement any deficiency in their case does not apply."

Proceeding with our comparison, sections 180 and 182 are substantially the same as regulations 14 and 15 respectively.

It is true that the latter two regulations make it clear that if called on to enter his defence an accused person retains the right to remain silent himself and need not call witnesses in his defence.

But in my view, the very presence of regulation 17 reinforces the argument that the law makers had changes in the existing law in mind. If regulation 13 leaves any doubt as to the changes intended the choice of words in regulation 17 should serve only to dispel such doubts.

"The court shall decide on the guilt or innocence of the accused *only* at the conclusion of the case for the *defence*" the regulation proceeds to say, and moreover "it shall so decide upon hearing and considering the evidence of *both the prosecution and the defence as a whole....*" (the emphasis is mine).

Can there be more manifest indication of the intention of Parliament to modify, in favour of the prosecution, the pre-existing state of criminal procedure in cases coming within the regulations?

The words of Lord Diplock in an authority cited by my Lord President, *Duport Steels Ltd.* v. *Sirs*,[4] seem to me to be particularly apt, for "the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral."

The advantage to the prosecution can only be but slight and that should include whatever comfort the knowledge that the defence would be called in any case has to offer to the Prosecutor where things begin to go wrong with the prosecution case, but the presumption of the innocence of an accused person remains unchanged.

It would not be out of place to suggest that judges should be urged to state at the close of prosecution case whether in their finding a *prima facie* case has or has not been made out by the prosecution, so that the accused person would know when it would be to his advantage to remain silent.

I would, with respect, allow the appeal, set aside the order of acquittal and order the accused to make their defence.

Appeal dismissed in so far as the point of law was concerned.

Solicitors: *Tengku Seri Laksamana & Isaacs.*

PUBLIC PROSECUTOR v. DATUK TAN CHENG SWEE & ANOR.

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya), Wan Suleiman, Chang Min Tat & Syed Othman F.JJ.) June 2 & August 27, 1980]

[Kuala Lumpur — Federal Court Criminal Appeal No. 21 of 1979]

Criminal Law and Procedure — Charge of corruption — Corrupt practice in approval of plans — Accused called to enter on their defence — Whether there was mens rea — Doing of an act forbidden by statute — Necessity not shown — Whether accused had rebutted prosecution case — Sentence — Municipal Ordinance (S.S. Cap. 133), s. 43(1) — Emergency (Essential Powers) Ordinance, 1970, s. 2 — Prevention of Corruption Act, 1961, s. 2.

Judicial precedent — Doctrine of stare decisis — High Court bound by decision of Federal Court.

In this case the 1st accused was the Commissioner of the Malacca Municipality and also the executive chairman and shareholder of a housing development concern, Almac. Almac had submitted a lay-out plan and two sets of building plans for the approval of the Municipal Council and the plans were passed by the 1st accused. He was charged that in approving the plans he had used his public office for his pecuniary advantage and had thereby committed offences against section 2(1) of the Emergency (Essential Powers) Ordinance, 1970. The second accused was charged with abetment of the offence on the two occasions when he sat in the committee.

At the trial the learned trial judge at the close of the prosecution case held that of the two essential ingredients of the offence against the first accused, the prosecution had established his guilty mind but not that he was a public officer. He therefore acquitted and discharged the accused ([1979] 1 M.L.J. 166). On appeal by the Public Prosecutor the Federal

Court held that on a proper construction the first accused was a public officer within the meaning of section 2 of the Prevention of Corruption Act, 1961 and sent back the case to the High Court with the order to call for the defence ([1979] 1 M.L.J. 174). At the continuation of the trial, the issue before the High Court was whether the defence had adduced sufficient evidence from which the court could hold that there was no guilty mind or that a doubt had been cast on the prosecution's evidence of the state of mind. The learned trial judge in his judgment considered the ruling of the Federal Court on the issue whether the first accused was a public officer. He expressed the view that the Federal Court was wrong but said that he would nevertheless not disregard the decision of the superior court. He held that the prosecution had failed to prove beyond reasonable doubt that the 1st accused approved the plans with an ulterior motive or that he abused his position as Commissioner for his own pecuniary or other advantage. He therefore acquitted both the accused ([1980] 1 M.L.J. 117). The Public Prosecutor appealed.

Held: (1) it is necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours, to follow similarly. The doctrine of *stare decisis* requires more than lip service;

(2) in this case at no time did the 1st accused or the 2nd accused ever declare their interests in Almac. They were therefore in breach of the statutory provisions of section 43(1) of the Municipal Ordinance and the doing of the act forbidden by statute supplied the *mens rea;*

(3) the accused were actively engaged in the development of the housing estate and this clearly showed that they knew that Almac's plans would be submitted for approval. There was evidence of purposiveness and haste in the approval of the plans which further established the knowledge of the accused;

(4) no occasion arose for the 1st accused to act *ex necessitate* or to fear an action in law;

(5) the offences in this case were serious but in view of the circumstances of the case the sentences imposed would be $2,000 on each charge on the 1st accused and $1,000 on each charge on the 2nd accused.

Cases referred to:-

(1) *Mirehouse* v. *Rennell* 6 E.R. 1015.

(2) *Cooper* v. *Southern Portland Cement Ltd.* (1972) 46 A.L.J.R. 302.

(3) *Sundralingam* v. *Ramanathan Chettiar* [1967] 2 M.L.J. 211.

(4) *Miliangos* v. *George Frank (Textiles) Ltd.* [1975] 2 W.L.R. 555.

(5) *Cassell & Co. Ltd.* v. *Broome & Anor.* [1972] 2 W.L.R. 645.

(6) *Labour Department* v. *Green* [1973] 1 N.Z. L.R. 412.

(7) *J.M. Allan* v. *Cloke* [1963] 2 W.L.R. 899.

FEDERAL COURT.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the appellant.

M. Shankar for the 1st respondent.

C. Navaratnam for the 2nd respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): At the close of the case of the prosecution against the respondents, and after hearing extensive arguments, the High Court at Malacca held that of the two essential ingredients in the offences of corrupt practice against the first respondent, the prosecution had established his guilty mind but not that he was a public officer. The judge accordingly acquitted and discharged the respondents: [1979] 1 M.L.J. 166. On appeal by the Public Prosecutor, this court held that on a proper construction, the first respondent was a public officer within the meaning of section 2 of the Prevention of Corruption Act, 1961 (Revised 1971) and sent back the case to the High Court with the order to call for the defence: [1979] 1 M.L.J. 174. It is clear that at this continuation of the trial, the only issue before the High Court was whether the defence had adduced sufficient evidence from which the court could hold that there was not this guilty mind or that a doubt had been cast on the prosecution's evidence of this state of mind. The prosecution and the defence both perfectly understood what they had to do when the defence was entered on. Neither the Solicitor-General who conducted the prosecution nor Mr. Shankar counsel for the first respondent made the slightest attempt to reopen the issue whether the first respondent was or was not a public officer. The record shows that they very correctly made no attempts to address the court on this matter.

Nevertheless, in the absence and without the benefit of any further argument or submission and entirely of his own accord, the learned trial judge, in his judgment at the close of the defence, took cudgels with the Federal Court and devoted at least a quarter of his written judgment to this matter. He was still of the opinion that the Federal Court was wrong and he was right and he clearly said so in his judgment which has now been published: [1980] 1 M.L.J. 117.

But for the fact of the publication, the judgment so far as it concerned the status of the first respondent as a public officer should perhaps best be ignored. The judge thought it fit and possible for him to distinguish the decision of this court from the case he had to deal with (it was the very same case), and he said that despite all that he had to say, he had no intention of disregarding the decision of the superior court. He did not consider what a waste of time his fulmination occasioned, but to waste time is perhaps his privilege. It is however necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High and other inferior Courts in a common law system such as ours, to follow similarly.

As far back as 1833, Baron Parke in *Mirehouse* v. *Rennell*[1] at page 1023 commenting on the duties of a judge has this to say:

> "Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

In *Cooper* v. *Southern Portland Cement Ltd.*,[2] Barwick C.J. held at page 307 that the Court of Appeal Division of the Supreme Court of New South Wales was bound by the actual decision of a case of the Privy Council and by the principles by which that decision is essentially supported, that is to say, by the basic reasons for its decision. Ong F.J. (as he then was) in *Sundralingam* v. *Ramanathan Chettiar*[3] said that each court is bound by the decisions of courts above it.

In *Miliangos* v. *George Frank (Textiles) Ltd.*,[4] Lord Denning M.R. at page 564 F6-G3 said in respect of the effect of a judgment of the Court of Appeal on the High Court that

"... whether right or wrong, it seems to me that once this court has given a decision upon it all lower courts should follow the decision of this court unless and until it is reversed by the House of Lords. In that way any embarrassment will be avoided."

Lord Gardiner L.C. in a practice statement on judicial precedent, [1966] 1 W.L.R. 1234; [1966] 2 M.L.J. xi, on behalf of himself and the Lords of Appeal in Ordinary, while modifying the then practice to reserve the right to depart from a former decision of the House of Lords when it appeared right to do so, nevertheless began by restating that

"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules."

That this restates the binding effect of a judicial decision on courts below it is clear from *Cassell & Co. Ltd.* v. *Broome & Anor.*[5] where Lord Hailsham of St. Marylebourne L.C. said at page 653, E5-F6:

"The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom."

Clearly the principle of *stare decisis* requires more than lip-service.

The publication of the judgment of this court in [1979] 1 M.L.J. 166 and of the second judgment of Ajaib Singh J. in [1980] 1 M.L.J. 117 has relieved us of the necessity to repeat the statutory provisions relevant to this case and many of the facts found by the judge. For the sake of convenience, however, it is sufficient merely to refer to the following: the Constitution of the Malacca Municipality was at the relevant times suspended and all the functions of the Council, including those of the President, Deputy President and the Councillors or any or all of them were transferred to one person, Datuk Tan Cheng Swee, who was to be the Commissioner of the Malacca Municipality and he was styled as such. His appointment was made by the State Authority for Malacca under section 398(3) of the Municipal Ordinance (S.S. Laws Cap. 133) as amended. He was to be assisted by a Committee of three. He was the chairman and the 2nd respondent a member. The Committee was advisory in nature and if he accepted its recommendation, he was acting not on any majority decision but under his own powers as the sole Commissioner. The responsibility was at all times his and his alone. He could if he so desired overrule his two advisers.

Datuk Tan was at the same time the executive chairman and a shareholder, holding by himself and through members of his family a 20% interest, in a housing development concern known as Almac which was seeking at that time to develop a piece of land owned by it into a housing estate. The 2nd respondent was also a shareholder but he was not a director. Almac submitted, among others, a lay-out plan and two sets of building plans for the approval of the Municipal Council, in other words, Datuk Tan himself. The Committee, after hearing the advice and/or recommendations of the expert officers of the Council who were concerned in seeing that the plans conformed to the building by-laws laid down by the Municipality or came within the acceptable dispensations of such by-laws, recommended that they be passed. Datuk Tan was not present at any of the meetings of the Committee. But he passed the plans. The charges against them were therefore that in approving these plans, Datuk Tan had used his public office for his pecuniary advantage and had thereby committed offences against section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 and the 2nd respondent had abetted him on the two occasions when he sat in the Committee.

The defence did not seek to contend against the status of Datuk Tan as the sole Commissioner of the Malacca Municipal Council or his position and interest in Almac or the 2nd respondent's status as shareholder in the company or the fact that the 2nd respondent sat in the Committee which recommended approval of the plans in question or that Datuk Tan subsequently approved them. The sole question in respect of Datuk Tan before the High Court at Malacca at the conclusion of the case for the defence was therefore whether he had a guilty mind when he acted as he did and in respect of the 2nd respondent, whether he had abetted the commission of any offence of corrupt practice by Datuk Tan.

In his written judgment, Ajaib Singh J. referred to the *dictum* in the previous judgment of this court that if the defence could satisfy the trial court on a balance of probabilities that the guilty element was missing, then the accused would be entitled to an acquittal and he considered that the judgment indicated that the question of *mens rea* and its extent was still open. With respect, the learned judge was right but he did not need the *dictum* referred to for such a fundamental proposition in our system of adversary trials that when the prosecution had raised a *prima facie* case against the accused, it was at all times open to the accused to rebut the prosecution case, on a balance of probabilities, or to cast a doubt on it. This basic principle must also apply where it was a question of a guilty mind. If the *dictum* merely expresses a fundamental principle, then clearly more should not be read into the Federal Court judgment than what was written therein. There was never any open invitation to the trial court to acquit whatever the evidence. On the other hand, it was also not a direction to convict. All that it said and meant was that the trial court should reasonably, properly and judicially consider the defence in the light of the prosecution case and come, on the totality of the evidence before it, to a correct decision, without fear or favour, in the proper exercise of its judicial function.

It was accepted by the defence that at no time Datuk Tan or the 2nd respondent had ever declared their interests in Almac. Nor could they claim the

protection of section 43(2) of the Municipal Ordinance since Almac is not a joint-stock company and a Commissioner is, indeed, as a corollary, deemed to have a pecuniary interest in Almac's plans. It follows therefore that both the respondents were in breach of section 43(1) which reads:

"43(1). A Commissioner shall not vote or be present at the discussion of any matter before the Commissioners or a Committee in which he has directly or indirectly by himself or by his partner any pecuniary interest"

by recommending and passing Almac's plans.

The provisions therefore of section 43(1) must be seen to destroy the main defence that he acted as he did in good faith and because the plans were found to be in good order and had been recommended. The doing of an act forbidden by law supplies *mens rea*: *Labour Department* v. *Green*[6] and *J.M. Allan* v. *Cloke*.[7]

Now acting in good faith must seem to imply that the respondents knew that the plans were those of Almac. If they knew, then their interest in Almac must mean that by passing Almac's plans, they would acquire a pecuniary advantage for themselves.

But if the defence of acting in good faith does not necessarily import this knowledge, the evidence that the respondents were concerned actively with the development of a housing estate must, in our view, establish this knowledge. With respect it seems to us that any finding to the contrary would, on the totality of the evidence, be perverse. It ignores the uncontradicted evidence that Datuk Tan sat in and presided over the board meetings of Almac in which the decision was made to proceed with the development of the housing estate, which inferentially must lead to the conclusion that Datuk Tan as Municipal Commissioner would be expecting the submission of the plans to him for his action. Further it did not take into consideration the unexplained evidence that in submitting the plans, Almac's architect had acted prematurely and resorted to a deliberate misinformation that sub-division had been approved. The evidence of purposiveness and haste must reasonably establish this knowledge.

It is also said by the defence for Datuk Tan that whether he knew or not, he acted under the doctrine of necessity. He was the sole Commissioner; his duty was to pass any plans that were in order, and if he did not do so, he would be failing in his duty and he would open himself to an action in law. Whether in damages or by way of *mandamus*, it was not however stated.

On reflection, and in view of the statutory provisions to which he will refer presently, we do not think the situation in any way approaches the cases of a lack of a judicial body, referred to in Judicial Review of Administrative Action (3rd Edn.) by *S.A. de Smith* at page 244 (*q.v.* [1980] 1 M.L.J. 117 at page 121). Section 298(3)(i) Municipal Ordinance (*q.v.* [1979] 1 M.L.J. 166 at page 175) under which Malacca P.U. 31 of 1967 was made appointing Datuk Tan as the sole Commissioner could be resorted to for the appointment of an *ad hoc* Commissioner for the purpose of Almac's plans. Alternatively, Datuk Tan could have refused to act, as perhaps he should have, thereby leaving it open to Almac to apply under section 144(13) directly to the State Authority. On such an application the State Authority becomes vested with the powers of the Commissioner and he would be the person to approve or otherwise deal with the plans. No occasion arises therefore for Datuk Tan to act *ex necessitate* or to fear an action in law.

The appeal of the Public Prosecutor must therefore be allowed. The order of acquittal and discharge is set aside and a conviction on the charges recorded against both respondents.

On the question of sentence, which we now have to consider, Mr. Shankar counsel for the first respondent has with his usual eloquence pleaded with us that having regard to the length of the trial and the several appearances both before the High Court and before us, and to the circumstances of his client's life and livelihood, no conviction should be recorded and he be cautioned and discharged. He was a first offender.

But the offences are very serious ones and carry a sentence of imprisonment not exceeding fourteen years or a fine not exceeding $20,000 or both such imprisonment and fine. Surely this country and the public must have a right to expect of its public officers a duty to conduct themselves, at all times, with the highest standards of probity and honesty and in accordance with the law. Anything less will inevitably result in loss of confidence in public administration and in the spread of the cancer of corruption in the lower levels.

Nevertheless, the trial court and this court must consider that the plans submitted were in accordance with or within the permissible dispensations of the bye-laws, the technical advisers had recommended their approval and if Datuk Tan had correctly advised himself to disqualify himself and to refer the plans to the State Authority for his action, the plans would have been passed. By not doing so he had clearly committed the offences with which he was charged but in the circumstances the pecuniary or other advantage which had accrued to him by his passing the plans was perhaps, as a matter of criminal culpability and consequence, less substantial than the case of a public officer who had pocketed money to which he had not any vestige or right to expect or demand.

In these circumstances and having regard to the unfortunate course in which this trial had been held, we do not propose to impose a sentence of imprisonment which, *prima facie*, is appropriate to an offence of corruption or corrupt practice, especially in high places.

We therefore impose a fine of $2,000 on each of the charges on which Datuk Tan had been convicted and a fine of $1,000 on the 2nd respondent on each of the two charges he had been found guilty of.

Appeal allowed. Order of acquittal and discharge set aside. Conviction recorded and fine imposed.

Solicitors: *Shearn, Delamore & Co.; Suleiman, C. Navaratnam & Co.*